



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
ONE CONGRESS STREET SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

July 19, 2007

Arleen O'Donnell, Commissioner
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

Re: Review and Action on Water Quality Standards Revisions

Dear Commissioner O'Donnell:

By letter of January 12, 2007, the Massachusetts Department of Environmental Protection ("MassDEP") submitted revisions to its surface water quality standards regulations to the Environmental Protection Agency ("EPA") for review. The revisions were adopted and effective on December 29, 2006, and were certified by MassDEP's General Counsel on January 11, 2007 as having been duly adopted pursuant to state law.

We are still in the process of reviewing the State's revisions and have not yet taken action pursuant to Section 303(c) of the Clean Water Act ("CWA"), other than the recent approval of the revised copper criteria. Nevertheless, in light of recent litigation that Entergy Nuclear Generation Company ("Entergy") has filed against Massachusetts regarding the provisions related to cooling water intake structures found at 314 C.M.R. §§ 4.05(3)(b)(2)(d), 4.05(3)(c)(2)(d), 4.05(4)(a)(2)(d), 4.05(4)(b)(2)(d), and 4.05(4)(c)(2)(d), we offer the following observations related to Entergy's interpretation of the CWA. We take no position on the issues raised by Entergy regarding state law.

Entergy has challenged the provisions related to cooling water intake structures ("CWIS") which expressly state MassDEP's authority to condition CWISs to ensure that water withdrawals are conducted in a manner that protect designated and existing uses and comply with narrative and numeric criteria contained in the State's water quality standards ("WQS"). Prior to the addition of these provisions, MassDEP had interpreted its WQS to apply to CWISs. *See, e.g.,* Amicus Brief of the Massachusetts Department of Environmental Protection in Support of EPA NPDES Permit No. MA-003654 (Dec. 22, 2003), at 5-12; and Supplemental Amicus Brief of the Massachusetts Department of Environmental Protection in Response to Briefs Filed by USGen and Utility Water Act Group ("UWAG") in Support of USGen's Appeal of EPA NPDES Permit No. MA-003654 (June 24, 2004), at 2-8). As MassDEP explained in its response to public comments on these provisions, the new language simply puts the regulated community on notice of MassDEP's preexisting authority. MassDEP Response to Comments at 14-15.

In its Complaint, Entergy alleges, among other things, that "... 'water quality standards,' under the Federal Act and the Massachusetts Act alike, regulate only discharges, not water withdrawals." *Entergy Nuclear Generation Company v. Massachusetts Department of Environmental Protection*, 07-0366, Superior Court of Massachusetts at Suffolk, Complaint at par. 13. In support of this assertion, Entergy references the comments it filed on the proposed revisions during the public comment period (January 26, 2007 letter from Goodwin Proctor on behalf of its clients Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Company, LLC). Those comments asserted that MassDEP does not have the authority under federal or state law to subject CWISs to requirements based on WQS. As discussed below, we disagree with Entergy's assertions in its comment letter and conclude, on the contrary, that the provisions are permissible, at least as a matter of federal law.

In its comments, Entergy contends that the provisions violate federal law because WQS only apply to water quality impacts from discharges and not to impacts associated with water intakes (i.e., withdrawals). Entergy reads the CWA to authorize water quality-based conditions to be imposed only in the form of effluent limitations on discharges. It also asserts that where Congress has established specific requirements on facilities "unrelated to discharges," such as in the case of CWA § 316(b)'s requirements for intake structures, states lack the authority to impose additional water quality-based requirements on such facilities.

Entergy's position is contrary to EPA's interpretation of the CWA. Section 303(c)(2) of the CWA requires states to adopt WQS which "protect the public health or welfare, enhance the quality of water, and serve the purposes" of the Act. The Clean Water Act does not limit the ability of states to apply their state water quality standards to discharges only. See *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994); *S.D. Warren Co. v. Maine Board of Env'l Protection*, ___ U.S. ___, 126 S.Ct. 1843 (2006). Section 510 of the CWA preserves to states the authority to adopt or enforce any more stringent requirement "respecting discharges of pollutants" (§ 510(A)) and "respecting control or abatement of pollution" (§ 510(B)) unless expressly provided otherwise in the CWA. "Pollution" is defined in CWA § 502(19) to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Impacts associated with CWISs clearly fall within the definition of "pollution." Section § 316(b), which requires the application of "best technology available" to CWISs, does not expressly limit or prohibit the imposition of water quality-based requirements on such structures. Accordingly, in its regulations implementing § 316(b), EPA makes it clear that CWISs must comply with any more stringent requirements necessary to comply with state law, including any applicable WQS. See, e.g., EPA's Phase I regulations under CWA § 316(b) at 40 C.F.R. §§ 125.84(e) and 125.80(d); see also 66 Fed. Reg. 65255, 65277-78 (December 18, 2001) (preamble to Final Rule); 65 Fed. Reg. 49060, 49079, 49091 (August 10, 2000) (preamble to Proposed Rule).

The Second Circuit, in its decision in *Riverkeeper v. United States Environmental Protection Agency*, 358 F.3d 174, 200-202 (2d Cir. 2004) ("*Riverkeeper I*"), confirmed EPA's interpretation of the applicability of state WQS to CWISs. In that case, which involved a challenge to EPA's Phase I § 316(b) regulations, the court rejected industry plaintiffs' arguments that EPA lacked any authority to impose requirements on CWISs based on state law. The court found that §§ 401 and 510 of the CWA allow states to impose requirements more stringent than EPA's, and


concluded that 40 C.F.R. § 125.84(e), which states the need for CWISs to comply with any more stringent state WQS and other requirements, was a "reasonable exercise" of EPA's authority. *Id.* at 202.

Finally, we note that EPA's Environmental Appeals Board's ("EAB") recent decision in the NPDES permit appeal involving Brayton Point Station supports the interpretation that state WQS can provide the basis for additional permit conditions on CWISs. *In re Dominion Energy Brayton Point, L.L.C.*, (NPDES 03-12) (EAB Feb. 1, 2006). In that decision, the EAB observed that NPDES permit limits with respect to CWISs must comply with any applicable WQS, citing to, among other things, the recent decision in *Riverkeeper*. *See slip op.* at 174-75, 196, 203. It further agreed that the Massachusetts WQS in effect at the time – i.e., even before the revisions making the State's authority explicit – could provide the basis for permit limits for CWISs. *Id.* at 186-87, 195-96.

In conclusion, we believe that there is nothing in the CWA that prohibits MassDEP from adopting and enforcing WQS related to CWISs to ensure that water withdrawals are conducted in a manner that protect designated and existing uses and comply with narrative and numeric criteria.

We look forward to continued cooperation with Massachusetts in the development, review, and approval of water quality standards pursuant to our responsibilities under the Clean Water Act. Please contact Ann Williams (617-918-1097) or Mark Stein (617-918-1077) in the Office of regional Counsel, or Bill Beckwith (617-918-1544) of my staff, if you have any questions.

Sincerely,


Stephen S. Perkins, Director
Office of Ecosystem Protection

cc: Glenn Haas, MassDEP
Marcia Sherman, MassDEP
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